

A Liew Choy Hung v Shah Alam Properties Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-90-94
ANUAR CJ (MALAYA), MOHD AZMI AND EDGAR JOSEPH JR FCJJ
28 APRIL 1997

B *Civil Procedure — Damages — General damages — Diminution in value of appellant's house due to nuisance and constant threat of continuing flooding caused by respondent's negligence — Whether appellant entitled to damages arising from diminution in value of her property in addition to damages for repairs or reinstatement*

C The appellant's luxury home was extensively damaged by severe flooding and water-logging, the damage having been caused by acts of nuisance and negligence on the part of the respondent, their servants or agents. The appellant commenced proceedings against the respondent and liability was admitted. As for the quantum of damages, special damages had been agreed at RM42,000 to cover cost of repairs or reinstatement. One aspect of the claim for general damages which was disputed related to the alleged diminution in value of the appellant's home due to the nuisance and constant threat of continuing flooding, for which she prayed for RM90,000, relying upon the opinion of a registered valuer. The trial judge rejected this branch of the appellant's claim on the grounds that the diminution in value was the true measure of damage only if the appellant was selling or reasonably intending to sell the property in its damaged state or where it could be established that the appellant was holding on the property merely for investment purpose. On the other hand, if the appellant intended to continue to occupy it and to repair the damage, the proper measure was the cost of all such repairs. The appellant appealed.

F **Held**, allowing the appeal in part:

- G** (1) The trial judge's approach to the assessment of damages as regards this part of the case was unduly rigid and that in the exceptional circumstances of the present case, a claim for diminution in value of the appellant's home did lie. In consequence, he had failed to take into the consideration the fact that land had a reputation, so that when, as here, a stigma attached to the dwelling house, because it was prone to flooding, it did not matter whether the appellant was in occupation of it, because the appellant would eventually sell (see p 312G-I); *Bunclark v Hertfordshire County Council* [1977] CLY 2148 followed.
- H** (2) The court did not consider that the sum of RM90,000 estimated by the appellant's expert to cover this particular head of the claim for general damages to be in any way excessive or wrong in principle. In the result, the appeal was allowed but only to extent that the quantum of damages awarded by the trial judge was increased by the addition of an award of RM90,000 by way of general damages for diminution in value of the appellant's home by reason of the stigma attaching to it (see p 313A-C).
- I**

[Bahasa Malaysia summary]

Rumah mewah perayu telah mengalami kerosakan yang besar akibat banjir dan air bertakung yang teruk yang mana kerosakan itu telah disebabkan oleh tindakan kacau-ganggu dan kecuai atas pihak penentang, pekerja atau ejennya. Perayu memulakan prosiding terhadap penentang dan liabiliti adalah diakui. Berkenaan dengan kuantum ganti rugi, ganti rugi khas telah dipersetujui sebanyak RM42,000 untuk merangkumi kos pembaikan atau pengembalian kedudukan asal. Satu aspek daripada tuntutan ganti rugi umum yang dipertikaikan berkaitan dengan penurunan nilai rumah perayu yang dikatakan disebabkan oleh kacau-ganggu itu dan ancaman banjir yang berterusan, yang mana perayu menuntut sebanyak RM90,000, bergantung kepada pendapat jurunilai berdaftar. Hakim perbicaraan menolak tuntutan perayu atas alasan bahawa penurunan nilai adalah pengiraan yang sebenar untuk ganti rugi hanya jika perayu akan menjual atau secara munasabah berniat untuk menjual harta itu dalam keadaannya yang rosak atau di mana ia boleh dibuktikan bahawa perayu memegang harta itu hanya untuk tujuan pelaburan. Sebaliknya, jika perayu berniat untuk terus menghuni rumah itu dan membaiki kerosakan, pengiraan yang wajar adalah kos pembaikan. Perayu membuat rayuan.

Diputuskan, membenarkan sebahagian daripada rayuan:

- (1) Pendekatan hakim perbicaraan terhadap penaksiran ganti rugi berkenaan dengan bahagian kes ini adalah terlampau tegar dan bahawa dalam keadaan-keadaan luar biasa kes ini, tuntutan penurunan nilai rumah perayu memang patut. Ekoran itu, beliau telah gagal untuk mengambil kira fakta bahawa tanah mempunyai reputasi, oleh itu apabila, seperti di sini, rumah kediaman telah dicap dengan stigma kerana ia adalah cenderung kepada banjir, adalah tidak menjadi hal sama ada perayu menghuni rumah itu, kerana perayu akan menjual rumah itu akhirnya (lihat ms 312G-I); *Bunclark v Hertfordshire County Council* [1977] CLY 2148 diikuti.
- (2) Mahkamah tidak fikir bahawa jumlah sebanyak RM90,000 yang dianggarkan oleh pakar perayu untuk merangkumi bahagian tertentu untuk tuntutan ganti rugi umum ini dalam apa cara pun adalah melampau atau salah dari segi prinsip. Sebagai keputusannya, rayuan ini dibenarkan tetapi hanya setakat bahawa kuantum ganti rugi yang diawardkan oleh hakim perbicaraan dinaikkan dengan penambahan award sebanyak RM90,000 dengan cara ganti rugi umum bagi penurunan nilai rumah perayu oleh sebab stigma yang dicapkan kepadanya (lihat ms 313A-C).]

Notes

For cases on general damages, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1098-1099.

A Cases referred to

Bunclark v Hertfordshire County Council [1977] CLY 2148 (folld)
Dodd Properties (Kent) Ltd & Anor v Canterbury City Council & Ors
[1980] 1 All ER 928 (refd)

B Appeal from: Civil Suit No P-55-82 (High Court, Kuala Lumpur)

CV Das (RK Nathan & Co) for the appellant.

Prasad Abraham (Prasad Abraham & Associates) for the respondent.

C Edgar Joseph Jr FCJ (delivering the judgment of the court): The appellant's luxury home known as No 16, Jalan Beverley, Ukay Heights, Kuala Lumpur — an exclusive residential area — was extensively damaged by severe flooding and water-logging which occurred between the months of August to November 1981, and again between February and March 1982, the damage having been caused by acts of nuisance and negligence on the part of the respondent, their servants or agents. These events led to the appellant commencing proceedings against the respondent in the High Court, Kuala Lumpur, and at the hearing, liability was admitted. As for the quantum of damages, special damages had been agreed at RM42,000 to cover cost of repairs or reinstatement and had indeed been paid pursuant to a consent order entered prior to the date of hearing.

D One aspect of the claim for general damages which was hotly disputed related to the alleged diminution in value of the appellant's home, for which she prayed for RM90,000. In support of this part of her claim, the appellant had relied upon the opinion of a chartered valuation surveyor and registered valuer Mr Th'ng Kim Kok, according to which 'the depreciation in value due to the nuisance and constant threat of continuing flooding, was in the region of RM90,000'. The learned trial judge had, however, rejected this branch of the appellant's claim for reasons which appear sufficiently from certain passages in his judgment to which we shall now refer.

E Having referred to the following passage in the judgment of Donaldson LJ in *Dodd Properties (Kent) Ltd & Anor v Canterbury City Council & Ors* [1980] 1 All ER 928 at p 938:

F The general object underlying the rules for the assessment of damages is, so far as is possible by means of a monetary award, to place the plaintiff in the position in which he would have occupied if he had not suffered the wrong complained of, be that wrong a tort or a breach of contract. In the case of a tort causing damage to real property, this object is achieved by the application of one or the other of two quite different measures of damage, or occasionally, a combination of the two. The first is to take the capital value of the property in the undamaged state and to compare it with its value in a damaged state. The second is to take the cost of repair or reinstatement. Which is appropriate will depend on a number of factors, such as the plaintiff's future intentions as to the use of the property and the reasonableness of those intentions. If he reasonably intends to sell the property in its damaged state, clearly the diminution in capital value is the

true measure of damage. If he reasonably intends to continue to occupy it and to repair the damage, clearly the cost of repairs is the true measure. And there may be in between situations.

the learned trial judge continued:

... it is clear to me that in order to achieve the general object underlying the rules for the assessment of damages in the case of tort causing damage to real property, the court is required to apply one or other of two quite different measures of damage. The first is to adopt the diminution in value to the plaintiff and the second is to adopt the actual cost of repair or reinstatement. Which measure is appropriate will depend on a number of factors. Be that as it may, the diminution in value is the true measure of damage if and only if the plaintiff is selling or reasonably intending to sell the property in its damaged state or where it can be established that the plaintiff is holding on the property merely for investment purpose. On the other hand, if the plaintiff intends to continue to occupy it and to repair the damage, the proper measure is clearly the cost of all such repairs.

Now in the present case the plaintiff had elected to occupy and to carry out all necessary repairs. She moved out of the property only one year ago not because of floods but for 'personal reason' of which this court has no knowledge. It is also relevant to note that upon her shifting out of the premises, she let it out to a third party. The ownership and possessory rights attached to such ownership still remain with her. Indeed, the evidence adduced in the present case dehors [?] any suggestion that the plaintiff is merely holding on to the premises as an investment. In this connection, it is to be noted that the Chester Ho's report was obtained for purpose of establishing the repair costs while the Th'ng's report was compiled solely to support the plaintiff's claim in this action. Under the circumstances, I am not satisfied that the plaintiff can claim for damages arising from diminution in the value of her property. The proper measure of damage to apply in the present case is to take the costs of all repairs or reinstatements.

The appellant, being dissatisfied with the learned trial judge's decision, had appealed to this court.

Before us, the whole of the material evidence as regards the claim for diminution in value was examined by counsel on both sides with great care and it is unnecessary to discuss it again. Suffice it to say that at the conclusion of the argument, we were satisfied that the learned trial judge's approach to the assessment of damages as regards this part of the case was, with respect, unduly rigid and that in the exceptional circumstances of the present case — to which we shall refer in a moment — a claim for diminution in value of the appellant's home did lie. In consequence, he had failed to take into the consideration the fact that land has a reputation, so that when, as here, a stigma attaches to the dwelling house, because it is prone to flooding, it does not matter whether the appellant is in occupation of it, because the appellant will eventually sell. We are supported in this by the following passage in the judgment of Brian Gibbens QC sitting as a deputy judge in the Queen's Bench Division in *Bunclark v Hertfordshire County Council* [1977] CLY para 2148:

... but the plaintiffs are each also entitled to general damages reflecting the diminution in value of their flats which must include the factor that Rosary

A Court Block C has now such a bad reputation as a jerry-built structure that it may take a long time to find anyone bold enough to buy any flat there.

We do not consider that the sum of RM90,000 estimated by the appellant's expert to cover this particular head of the claim for general damages to be in any way excessive or wrong in principle.

B In the result, the appeal was allowed but only to extent that the quantum of damages awarded by the learned trial judge was increased by the addition of an award of RM90,000 by way of general damages for diminution in value of the appellant's home by reason of the stigma aforesaid attaching to it. In all other respects, the judgment of the learned trial judge was upheld. The respondent was ordered to pay the costs of the appeal and there was the usual order for refund of deposit.

C *Order accordingly.*

Reported by Jafisah Jaafar

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